Supreme Court, U. S.
FILED
FEB 28 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1099

PHOENIX NEWSPAPERS, INC., an Arizona corporation; EUGENE C. PULLIAM and ALBERT J. SITTER,
Petitioners,

v.

JULIAN PEAGLER and DODGE CITY MOTORS, INC., an Arizona corporation,
Respondents.

Petition for a Writ of Certiorari to the Superior Court of the State of Arizona, in and for the County of Maricopa and the Arizona Supreme Court

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CONSTITUTIONAL PROVISIONS

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Petition for a Writ of Certiorari to the Superior Court of the State of Arizona, in and for the County of Maricopa and the Arizona Supreme Court

Petitioners pray that a Writ of Certiorari issue to review the order of the Superior Court of the State of Arizona, in and for the County of Maricopa, entered on December 8, 1971 denying petitioners' Motion for Summary Judgment and the order of the Supreme Court of Arizona declining to accept jurisdiction of petitioners' Petition for Special Action to review the order of the superior court denying the Motion for Summary Judgment.

OPINION BELOW

The orders which this Petition for Writ of Certiorari seeks to review are not reported. The orders complained of are found in the Appendix.

JURISDICTION

The order of the superior court denying petitioners' Motion for Summary Judgment was entered on December 8, 1971. The order of the Arizona Supreme Court declining, by a four to one vote, to accept jurisdiction to review the trial court's denial of the Motion for Summary Judgment was entered on February 1, 1972.[1] Thereafter, petitioners moved for stay of proceedings in the superior court pending disposition of this Petition, which Motion was granted on February 8, 1972.

The question which petitioners squarely presented to both the superior court and the Arizona Supreme Court was

1. Petitioners sought discretionary review in the Arizona Supreme Court by way of Petition for Special Action. Rules of Procedure for Special Action were adopted by the Arizona Supreme Court, effective January 1, 1970. The "Special Action" takes the place of extraordinary writs and is designed to allow the appellate courts discretionary review in order to correct abuses of discretionary powers, failure to exercise discretion, excessive jurisdiction and arbitary, capricious actions or abuse of discretion. (Rule 3, p. 278, Vol. 17 A.R.S. 1971-1972 cumulative pocket part.) Illustrative, is Dollar a Day Rent a Car v. Superior Ct., 107 Ariz. 87, 482 P. 2d 454 (1971), wherein the Arizona Supreme Court reviewed and overturned the refusal of a trial judge to permit a plaintiff to amend its Complaint and bring in an additional party defendant. The Petition may be filed in "any" appellate court, but if the action might have been brought at the trial level in the first instance the reasons for initiating proceeding at appellate level are to be given. (Supreme Court Rules of Procedure for Special Actions, Vol. 17 A.R.S. 1971-1972 cumulative pocket part, p. 275, et. seq.). *See also* Grobe v. McBride, 105 Ariz. 577, 468 P.2d 936 (1970) where the court again, utilizing the Special Action process, reviewed an order of the superior court denying a Motion to Dismiss and upon such review entered an order reversing the superior court order denying the Motion to Dismiss.

whether the record in this case at the time of the hearing on the Motion for Summary Judgment reflected sufficient evidence of actual malice within the rule of *Times v. Sullivan*, 376 U.S. 254 (1964); *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) and other related cases, to withstand entry of judgment in favor of petitioners as a matter of law.

Petitioners in their Answer to the Complaint raised the constitutional issues on the grounds that the alleged defamatory material was within the first amendment protection because the publication involved a matter of general or public concern and therefore was entitled to protection under *Rosenbloom v. Metromedia, supra,* and urged to the superior court and the supreme court that the question of the existence of actual malice was and is a constitutional issue to be determined by the court in the first instance at the earliest practical time, applying the *Times'* test of actual knowledge of falsity or reckless disregard of truth or falsity. *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970).

The failure of the trial court to review the evidence of actual malice in light of *Times* and the Arizona Supreme Court's refusal to grant discretionary review, thus forcing a long and expensive trial and pre-trial and post-trial procedures in a situation where clearly respondents cannot prove actual malice with clear and convincing evidence (*Rosenbloom v. Metromedia*) creates the "chilling effect" upon petitioners' first amendment rights which this Court has clearly and unequivocally stated shall not be permitted. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Mills v. Alabama*, 384 U.S. 214 (1966); *Rosenbloom v. Metromedia, supra.*

Petitioners' right to early relief from the "chilling effect" of pending libel litigation by determination at the summary judgment stage of the existence of sufficient evidence to show actual malice with convincing clarity, is in itself an

important first amendment right, vindication of which should not wait the outcome of protracted litigation. *Dombrowski v. Pfister,* 380 U.S. 479, 487.

The trial court failed to accept its responsibility of independently reviewing the evidence and protecting petitioners' first amendment rights against continuing legal harassment. The refusal by the Arizona Supreme Court to free petitioners from the "chilling effect" of continued unwarranted legal harassment upon the opportunity becoming first legally available to it to act upon petitioners' claims of invasion of their first amendment rights constitutes a final denial of this independent constitutional right of petitioners "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 at 546 (1949).[2]

If, in fact, the continuation of libel litigation after it clearly appears the evidence fails to meet standards as explicated in *Times* and following cases constitutes an invasion of first amendment rights of a newspaper publisher, then petitioners have, indeed, been finally denied protection for these important federal rights by both the Arizona trial court and the Arizona Supreme Court.

If petitioners had not sought relief in the Arizona Supreme Court from the arbitrary and capricious action of the trial judge in denying petitioners' Motion for Summary

2. The "chilling effect" concept has indeed been present in this action in its most concrete form. For example, respondents have been permitted by both the trial court and the supreme court to pry into the intimate financial affairs of all the petitioners. Interrogatories directed to the newspaper, its publisher and the reporter inquiring into net income, net worth and stock holdings have been held proper by the state courts over objections by petitioners that such inquiry constitutes an unwarranted invasion of petitioners' fourth and fourteenth amendment right of privacy.

Judgment and thereby a judicial review of the sufficiency of the evidence to meet first amendment free speech-free press requirements by the Petition for Special Action, it might be properly claimed this important federal right had not been finally denied by the Arizona courts. Petitioners did exhaust all avenues available to them in the state courts and have been rebuffed at both the trial and highest appellate court level.

Under the Arizona court system, litigants claiming first amendment rights in civil libel damage litigation as compared to similar litigants in the federal system are "second class citizens" denied ready protection at the earliest practical date for their first amendment rights. *Cf. Wasserman v. Time, Inc., supra; Time, Inc. v. McLaney,* 406 F.2d 565 (5th Cir. 1969); *Thompson v. Evening Star Newspaper Co.,* 394 F.2d 774 at 776 (D.C. Cir. 1968); *Washington Post Co. v. Keogh,* 365 F.2d 965 (D.C. Cir. 1966).

Petitioners therefore assert that the "finality" requirement of 28 U.S.C. § 1257 (3) has been met. *Minneapolis, St. P. & S. Ste. M. R. Co. v. Rock,* 279 U.S. 410 (1928); *Virginian R. Co. v. Mullens,* 271 U.S. 220 (1925); *Mercantile Nat'l Bank v. Langdeau,* 371 U.S. 355 (1963); *Local No. 438 Constr. & Gen. Laborers' Union v. Curry,* 371 U.S. 542 (1963); *Gillespie v. U.S. Steel Corp.,* 379 U.S. 148 (1964); *Rosenblatt v. American Cynamide Co.,* 15 L.Ed.2d 39, 86 S.Ct. 1 (1965) (not reported in U.S. Supreme Ct. Reports).

Illustrative of the principle involved here is *Gillespie v. U.S. Steel Corp., supra,* in which the petitioner was the mother of a deceased seaman. She instituted an action in the United States District Court in Ohio under the Jones Act asserting a right of recovery for herself and her other children, the brothers and sisters of the deceased seaman. Petitioner also claimed a right of recovery under the Ohio wrongful death statute. The Complaint in addition sought to

recover damages for pain and suffering sustained by the seaman prior to his death. The district court, on motion of respondent, struck from the Complaint all allegations referable to the Ohio wrongful death statute and all reference to recovery for benefit of the brothers and sisters.

Petitioner then appealed to the court of appeals and also, because of "finality" problems, sought extraordinary relief by way of Petition for Writ of Mandamus in the court of appeals. The court of appeals determined the appeal on its merits, apparently treating the matter as an appeal pursuant to 28 U.S.C. § 1292 (b). From the ruling of the court of appeals affirming the trial court, this Court granted certiorari to *review the Motion to Strike.*

Mr. Justice Black, speaking for this Court, said in discussing "finality" as required to give the Court jurisdiction:

> [O]ur cases long have recognized that whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.' Cohen v. Beneficial Industrial Loan Corp. supra, 337 U.S. at 546. . . Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511, 94 L ed 299, 302, 70 S Ct 322, pointed out that in deciding the question of finality the most important competing considerations are 'the inconvenience and costs or piecemeal review on the one hand and the danger of denying justice by delay on the other' . . . . And it seems clear now that the case is before us that the eventual cost, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided. 379 U.S. at 152-153.

Another case of particular interest in this area is *Rosenblatt v. American Cyanamide Co., supra.* In *Rosenblatt,* the appellant had filed in the New York State trial court a Motion to Dismiss for lack of jurisdiction over his person, claiming that service upon him in Italy under the New York "long-arm" statute was ineffective to confer state court jurisdiction over him. The trial court denied the Motion and appellant appealed to the appellate division which affirmed as did the New York Court of Appeals. Appellant raised in his state court proceedings the question of whether the New York "long-arm" statute as applied to him would be unconstitutional under the fourteenth amendment to the United States Constitution.

After affirmance by the state court of appeals, Rosenblatt appealed to the United States Supreme Court pursuant to 28 U.S.C. § 1257 (2). Rosenblatt then applied to Justice Goldberg for a stay pending appeal.

Justice Goldberg, in ruling upon the application for stay in an opinion in Chambers, noted:

> Since it is apparent * * * that there has as yet been no trial of this case on the merits, and the order appealed from was in response to a pretrial motion, an initial question arises as to whether the judgment below is a 'final' one for purposes of review by this Court. 28 USC § 1257. Although neither of the parties has mooted the question, it goes to the jurisdiction of this Court and must be considered. Of course, no stay should be granted pending an appeal which would not lie. I am satisfied, however, that under our decisions the judgment of the New York Court of Appeals from which this appeal is sought was a final one. There are two recent opinions of this Court which impel me to this conclusion, Local 438 Construction Laborers' Union v. Curry, 371 US 542, 9 L ed 2d 514, 83 S Ct 531, and Mercantile Nat'l Bank v. Langdeau, 371 US 555, 9 L ed 2d 523, 83 S Ct 520. Here, as in Curry,

there has been: (1) a final assertion of jurisdiction, with no further review of that issue possible in the state courts,[6] (2) a threat of serious erosion of national policy (here, the due process right against subjection to excessive state assertions of in personam jurisdiction); and (3) a state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case. Langdeau held final a preliminary determination of venue which would have led to a totally unnecessary trial, where the federal right asserted was precisely one not to stand trial at all in the state court where the complaint had been filed. These cases rest upon the premise that a litigant should not be forced to take the risk of a default judgment in order to obtain the benefits which national policy—in Curry, federal pre-emption of unfair labor practice cases; in Langdeau, a special venue statute for national banks; here, if appellant is correct, due process—is designed to afford him. I therefore conclude that the judgment below is a final one.

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6. As in Curry, the jurisdictional issue here would merge with the merits, and hence would ultimately be reviewable in this Court after a trial was held. But Curry indicates this does not preclude finality.

15 L.ed 2d at 42-43.

Petitioners also assert that the superior court order and the order of the Arizona Supreme Court declining jurisdiction and therefore refusing to exercise its discretion to review the order of the trial court constitutes the order of the superior court an order of the highest state court in which decision could be had. *See e.g., Minneapolis, St. P. & S. Ste. M. R. Co. v. Rock, supra,* where this Court held:

> 'Whenever the highest court of a state by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law *can* exercise appellate authority, the jurisdiction of this court to

review such decision, if it involves a Federal question, will, upon a proper proceeding, attach.' Williams v. Bruffy, 102 U.S 248, 255, 26 L. ed. 135, 137. 279 U.S. 410 at 412. (Emphasis supplied.)

In *accord, Virginian R. Co. v. Mullens, supra,* where the Court granted certiorari to review the verdict and judgment entered by the state trial court after the state appellate court declined a petition to review the judgment. To the same effect, *Powell v. Texas,* 392 U.S. 514 (1968); *Thompson v. City of Louisville,* 362 U.S. 199 (1960); *Canizio v. New York,* 327 U.S. 82 (1946); *Kentucky v. Powers,* 201 U.S. 1 (1906).

Clearly the issue presented by this Petition for Writ of Certiorari is serious and apparently, at least as treated by the state courts of Arizona, unsettled, and certainly is likely to be dispositive of this litigation. With the presentation of these criteria, this Court has indicated a willingness to exercise discretion and grant Petitions for Writ of Certiorari pursuant to 28 U.S.C. § 1257 (3). *See Brady v. Maryland,* 373 U.S. 83 (1963) n. 1 at 84.

CONSTITUTIONAL PROVISION INVOLVED

First and fourteenth amendments to the Constitution of the United States.

QUESTION PRESENTED

In this state court libel action against a newspaper, its publisher and a reporter, involving first amendment protection, the state trial court and highest state appellate court have refused, upon proper motion by defendants, to grant defendants judgment although the record disclosed and plaintiffs could marshal no evidence which, if proved at trial, would demonstrate actual malice in the sense of

Times v. Sullivan, Rosenblatt v. Metromedia and related cases.

Does such action by the state courts constitute a final denial to defendants of their substantial constitutional rights of freedom of speech and press as guaranteed by the first and fourteenth amendments?

STATEMENT OF THE CASE

Respondent Julian Peagler is an individual and a resident of the County of Maricopa, State of Arizona, and the principal officer and executive of respondent Dodge City Motors, Inc., an Arizona corporation, having its principal place of business in the City of Phoenix, State of Arizona. The corporation, Dodge City Motors, Inc., is engaged in the business of selling new and used automobiles.

Petitioners, Phoenix Newspapers, Inc. and Eugene C. Pulliam, are the owner and publisher of The Arizona Republic and Phoenix Gazette and Albert J. Sitter is the reporter who wrote the news article complained of by respondents. The Amended Complaint alleges that the place of business of Peagler's Dodge City and of Dodge City Motors, Inc., the correct corporate name, was 1521 East Camelback Road, Phoenix, Arizona.

The *material* facts required for a resolution of this problem are not many nor complicated.

The Arizona Legislature, in its 1970 session adopted what became known as House Bill 102 which purported to regulate direct or door to door selling and to provide consumer protection against claimed frauds which had been worked in the past by door to door salesmen.

Business involved in direct sales became concerned that the measure was unduly restrictive and began talk of a referendum petition to prevent the statute from becoming effective.

Considerable controversy developed as between advocates of the statute as necessary to protect the consumer and those who asserted it, in effect, hamstrung direct sales businesses. A direct sales association was formed to organize and promote the referendum effort. (The foregoing fact statement stems primarily from the deposition of petitioner Sitter and facts commonly known and discussed in the Phoenix community.) Respondent Albert J. Sitter, a reporter for The Arizona Republic, against this background of public interest and controversy, was assigned by his employer to review the Better Business Bureau and its relationship to the Direct Sellers Association and House Bill 102 dealing with direct selling and to investigate and report in this regard whether the Better Business Bureau was performing its proper function of consumer protection (Sitter deposition pp. 45-46.) While he was at the Better Business Bureau office seeking information from Jim White, its Manager, concerning the relationship between the Better Business Bureau, the Direct Sellers Association and the referendum on House Bill 102, a Mrs. Kay Runser, an employee of the Bureau whose duties included the processing of consumer complaints, saw him and later that day telephoned him to tell him that he might be interested in some information she wanted to give him in regard to the Better Business Bureau. (Kay Runser deposition pp. 6-8; Sitter deposition pp. 43, 45.) The next day, Mrs. Runser, Vern Terrell, a former Better Business Bureau employee, and Sitter met for lunch because Mrs. Runser told Sitter she would prefer to speak with him in person rather than on the telephone. (Runser deposition p. 9.) At the luncheon they discussed the Direct Sellers Association and House Bill 102. Kay Runser then told Sitter that she was upset and was going to resign. She handled customer complaints coming into the Bureau and was very concerned because

nothing had been done in the case of many of the complaints that had been filed with the Bureau and the fact that no effort had been made by Jim White to reprimand members of the Bureau who had large files of unresolved complaints. When asked who these were, she said that tops on the list according to her knowledge on the job, were Peagler's, Carpetime and Family Publications. (Sitter deposition p. 68.)

As a result of the interview, Sitter called Jim White, Manager of the Better Business Bureau, and discussed the statements Mrs. Runser had made to him. Sitter also called and talked to Peagler, and Peagler's General Manager, Jim Young. The publication involved appears in the Appendix.

Respondents assert five separate statements in the article as actionable.

1. Terrell and Mrs. Runser cited three firms with the longest records of unresolved consumer complaints which are allowed to remain BBB members in good standing.
2. They were identified in the order of frequency of complaints as Peagler's Dodge City, 1521 East Camelback; Carpetime, 1240 East Indian School and Family Publications Service, 3424 North Central.
3. On the rolls, White admitted, are some shady dealers, though all are sheltered under the BBB umbrella of respectability. Advised of Mrs. Runser's criticisms, White disclosed that the BBB is planning to bear down on Peagler's.
4. White said, who will take the matter before the board of directors in September to cancel the membership, I've already got 21 complaints written out and ready to go to the board.
5. It appeared, White said, many of the complaints, (against Peagler's) involve misrepresentation and

advertising in selling. Although I can't prove it, it appears to be based on bait and switch.

As pictured in the Amended Complaint, the article complained of highlights Peagler's involvement with consumer complaints. As actually written and published the news story concerned itself with the involvement of the Better Business Bureau and its Manager, Jim White, in the Direct Sellers Association and the referendum on House Bill 102, a matter admittedly of public or general interest or concern.

Following the conference with Mrs. Runser and Terrell, Sitter called Jim White, Manager of the Better Business Bureau, to check with him the accuracy of the statements made by Runser and Terrell. Sitter had no more than begun his question to White in reference to Mrs. Runser's statement about Peagler's when White interrupted Sitter to tell him that Peagler's was indeed the subject of many unresolved complaints, so much so that White had "21 complaints written out and ready to go to the board" (BBB)—an exact quote in the article of White's statement to Sitter.

Sitter had no reason to doubt Mrs. Runser's veracity or accuracy. Sitter's affidavit attached to petitioners' Motion for Summary Judgment confirms this. White confirmed the seriousness of the complaints against Peagler's.

The record is as barren of evidence which even suggests or infers that any petitioner knew that any part of the article complained of was untrue or had any real doubt that it was true as Mother Hubbard's cupboard was of any bone.

This being true, respondents are not entitled to override the first amendment guarantees of free speech and free press.

THE REASONS FOR GRANTING WRIT

The mandates of the Federal Constitution as interpreted and explicated by the Court are binding upon all state courts and in all state court libel actions involving first

amendment protection, the state courts are bound by the rules enunciated by the Court, *Provident Sav. Institution v. Massachusetts*, 73 U.S. (6 Wall.) 611, 628 (1867); *South Carolina v. Bailey*, 289 U.S. 412, 420 (1933); *Henry v. Rock Hill*, 376 U.S. 776, 777 (1964); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

It is the constitutional obligation of the Arizona Superior Court and Arizona Supreme Court to review the evidence at the earliest practical time and to halt unsupported civil libel damage actions by a business enterprise and its principal corporate officer against a newspaper, its publisher and a reporter arising out of an article of general or public concern when the record discloses the barrier to such claims raised by the first amendment has not been surmounted because of a failure to demonstrate the existence of actual malice. *New York Times Co. v. Sullivan, supra; Garrison v. Louisiana*, 379 U.S. 64 (1964); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Associated Press v. Walker*, 388 U.S. 130 (1967); *Rosenbloom v. Metromedia, supra; St. Amant v. Thompson*, 390 U.S. 727 (1968); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Monitor Patriot v. Roy*, 401 U.S. 265 (1971).

Clearly, the reasoning of the superior court and the Arizona Supreme Court runs counter to the Court's clear language in *Rosenbloom* where the Court recognized the right to early relief from the "chilling effect" of pending libel litigation is, in itself, an important first amendment right:

> We thus hold that a libel action, as here, by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not. . . .

> It is not simply the possibility of a judgment for damages which results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance. 402 U.S. 29 (1971), 29 L.Ed.2d at 316-317.

The orders of the state superior court and state supreme court if allowed to stand, may seriously erode and undermine the rule enunciated in *Times* and as explicated by the Court in *Garrison, Rosenbloom* and related cases, particularly as to the "chilling effect" aspect of threatened litigation upon first amendment rights of freedom of speech and press.

Indeed, in view of the manifest reluctance of state courts to accept and adhere to the *Times* doctrine as is evidenced by the state court decisions subsequent to *Times* which this Court has been obliged to review and set aside for failure to follow the *Times* rule, the action of the Arizona Supreme Court in failing to review the evidence and order judgment for petitioners, despite the plain inadequacy of the proof to meet the *Times* standards, may well trigger a pattern which will not be in the public interest and may eventually weaken or even eviscerate the salutory doctrine as enunciated in *Times* and its progeny.[3]

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3. Illustrative of this problem is Phoenix Newspapers v. Church, 103 Ariz. 582, 447 P.2d 840, the only libel action involving first amendment protection decided by the Arizona Supreme Court since Times v. Sullivan. In Church, the Arizona Supreme Court while apparently paying lip service to Times, in fact ignored or misinterpreted the Court's plain language in regard to the constitutional mandate of the first amendment by holding that Church, the then Attorney General of Arizona running for re-election had created a jury issue on actual malice although evidence unquestionably failed to establish that the editorial complained of was published with knowledge of falsity or in reckless disregard of the truth.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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400 Security Building
Phoenix, Arizona 85004

Appendix A

In the Superior Court
of.
Maricopa County, State of Arizona

C 240270

Div. 24
February 15, 1972

Hon. Gerald J. Strick, Judge or Commissioner
Wilson D. Palmer, Clerk
D. Pettibone, Deputy
Julian Peagler and Dodge City Motors, Inc.

vs.

Phoenix Newspapers, Inc.,
Eugene C. Pulliam, J. Edward Murray, and Albert J. Sitter

O'Connor, Cavanagh, A, W, K & B
by Richard McShannon

Gust, Rosenfeld & Divelbess
by James F. Henderson

Snell & Wilmer
by Arthur P. Greenfield

IT IS ORDERED nunc pro tunc as of December 8, 1971, denying defendant Pulliam's Motion for Summary Judgment, defendant Sitter's Motion for Summary Judgment, defendant Phoenix Newspapers' Motion for Summary Judgment and the Motion for Summary Judgment regarding the individual claim for individual plaintiff Peagler.

Appendix B

Supreme Court
State of Arizona
Phoenix

85007

Supreme Court
No. 10752

Maricopa County
No. C 240270

February 2, 1972

PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM and ALBERT J. SITTER,

Petitioners,

vs.

JULIAN PEAGLER, and DODGE CITY MOTORS, INC., an Arizona corporation; THE HONORABLE GERALD J. STRICK, Judge of the Superior Court of Maricopa County, Arizona, and THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA,

Respondents.

The following action was taken by the Supreme Court of the State of Arizona on February 1, 1972 in regard to the above-entitled cause:

"ORDERED: The Court declines to accept jurisdiction of the Petition for Special Action, with Justice Fred C. Struckmeyer, Jr. voting to accept."

CLIFFORD H. WARD, Clerk

/s/ MARY ANN HOPKINS
Deputy Clerk

TO: O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, Suite 1800 First Federal Savings Building, Phoenix, Az. 85012
Snell & Wilmer, 400 Security Building, Phoenix, Az. 85004
Gust, Rosenfeld & Divelbess, 300 Security Building, Phoenix, Az. 85004
Hon. Gerald J. Strick, Judge of Superior Court, 101 W. Jefferson, Phoenix, Az. 85003

Appendix C

In the Superior Court
of
Maricopa County, State of Arizona

C 240270

Div. 24
February 8, 1972

Hon. Gerald J. Strick, Judge or Commissioner
Wilson D. Palmer, Clerk
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Snell & Wilmer
by Arthur P. Greenfield

The Court having considered Motion by defendants Phoenix Newspapers, Inc., Eugene C. Pulliam, and Albert J. Sitter for stay of proceedings,

IT IS ORDERED staying all further proceedings in this cause pending determination by the United States Supreme Court of a Petition for Writ of Certiorari. This order is predicated upon the avowal to the Court of Mr. Greenfield that such a petition is in the process of being filed with the United States Supreme Court and will be so filed without delay.

In view of the foregoing,

IT IS ORDERED vacating pretrial conference set for February 9, 1972, and trial date of February 15, 1972.

Appendix D

The Arizona Republic—Sunday, August 30, 1970

Business bureau violates trust, ex-employes assert

By Albert J. Sitter

The Phoenix office of the Better Business Bureau has among its own members some business firms which engage in highly questionable sales methods, two former employes charged last week.

The former employes are Vernon Terrell, former membership chairman, and Mrs. Kay Runser, who resigned Wednesday as the bureau's trade practice consultant.

Both said in a joint interview that they were especially disillusioned when the BBB further tarnished its record by supporting the Direct Sellers Association, formed in early July for the purpose of scuttling House Bill 102, a tough consumer protection measure.

Terrell and Mrs. Runser cited three firms with the longest records of unresolved consumer complaints which are allowed to remain BBB members in good standing.

They were identified, in the order of frequency of complaints as Peagler's Dodge City, 1521 E. Camelback; Carpetime, 1240 E. Indian School, and Family Publication Service, 3424 N. Central.

House Bill 102 is intended to regulate home solicitation sales.

Rep. Manuel Pena, D-Maricopa, who sponsored the legislation, describes its purpose as being "an effort to bring law and order to a sector of the market place in which anarchy has prevailed."

By collecting more than 30,000 signatures on petitions, the association succeeded in preventing the bill from becoming law as scheduled on Aug. 11. The question now is expected to be put to a vote of the people on Nov. 3.

Subsequent investigations of the petitions have disclosed evidence of numerous irregularities, including forged names, false witnesses and gross misrepresentation of the purpose of the petitions.

The most frequently heard complaint from petition signers, many of whom now demand that their names be removed, is that they were told that signing the petition would help rid the state of door-to-door salesmen.

Terrell and Mrs. Runser were particularly critical of the role played by Jim White, BBB manager, as one of the organizers of the Direct Sellers Association. White, in fact, helped to form the group last month and volunteered to serve as secretary.

In this capacity, White advised the representatives of, by his own estimate, between 400 and 500 enterprises who make home solicitation sales on how to conduct the petition campaign.

Of the several hundred association members, White said, only 32 are BBB members.

"There is," White explained, "a certain obligation to the 32 members that we have in that area. You can't just close your eyes and say, 'No, we can't help you.' After all they do pay our salaries here.

"Since there were X number of these people who were affected by this bill," White said, "I felt that there should be at least some effort on our part to try and save them."

On the Direct Sellers Association roster are companies which sell directly in the home such diverse services and products as hearing tids, [sic] water softeners, roofing, home improvements, magazines, plumbing, encyclopedias, air conditioners, vacuum sweepers, carpeting, awnings, aluminum siding, home freezer food plans, photographs, reducing plans, swimming pools, fences, sewing machines, pots and pans, insect extermination and sprinkler systems.

On the rolls, White admitted, are some shady dealers, though all are sheltered under the BBB umbrella of respectability.

Mrs. Runser said that White's close connection with the Direct Sellers Association was one of a long list of incidents of which she personally disapproved.

"I felt," she said, "that I could no longer stay with the bureau and remain ethical. The greatest disservice is to the majority of legitimate businesses among the membership. They are tainted by the activities of others who should not qualify for membership."

The public, Mrs. Runser added, has misplaced its trust in the BBB for consumer protection.

"When a complaint is made about a member," she said, "the bureau's policy is. 'The customer is always wrong.' "

Terrell, whose job was to recruit new members for the BBB, said, "The only qualification for membership is a check (for dues)."

Terrell said he was fired about six weeks ago by White after questioning internal office practices and the character of some members.

Mrs. Runser, who was in charge of processing complaints from the public, said that she became disgruntled over the lack of action against member companies.

She revealed that the BBB's policy is to convey the complaints to the accused firms. As far as the bureau is concerned, the complaint is no longer a matter of record after the company says it has satisfied the complaint. But no effort is made to determine whether the customer is satisfied, she added.

The greatest number of complaints on file against any one company, Mrs. Runser said, were lodged against Peagler's Dodge City.

Despite the firm's frequent apparent transgressions and lack of response to complaints, no move has been made to reprimand the auto dealership, she said.

Advised of Mrs. Runser's criticisms, White disclosed that the BBB is planning to bear down on Peagler's.

"I've already talked to the head of the screening committee (about Peagler's)," White said, "who will take the matter before the board of directors in September to cancel the membership. I've already got 21 complaints written out and ready to go to the board.

"It appears," White said, "that many of the complaints (against Peagler's) involve misrepresentation in advertising and selling. Although I can't prove it, it appears to be based on bait and switch.

"If Kay (Mrs. Runser) would have come to me with this," White said, "she would have known what was being done."

Mrs. Runser said she repeatedly brought the problem to White's attention with no apparent effect.

When originally contacted by The Arizona Republic, both Julian Peagler, owner of the auto agency, and Bob Young, general manager, maintained that the company had not received any complaints from the BBB.

Later, after checking with White, Peagler said that there had indeed been complaints but that they had not been brought to his or Young's attention.

"Now I've asked that these be sent to me personally," Peagler said. "Last month we sold 5,000 used and 1,600 new cars and I've been oblivious to these kinds of problems. I did not know of one sales complaint.

"Most complaints," Peagler added, "fall in the area that a used car is not satisfactorily described. But I'm not aware of any complaints that are not properly handled."

Another subject of frequent unsatisfied complaints, Mrs. Runser said, is the Family Publication Service, which makes its initial contact by telephone to sell magazine subscriptions.

White said that Family Publication's membership "has not been renewed." So bad is the company's record, he added, that it will be proposed at the BBB district meeting in October to cancel Family Publication's memberships with all 26 offices of the BBB in the district.

The firm's misdoings, according to some complaints, include falsely telling persons they have "won" a magazine subscription and that all they need pay is for the postage. Or that customers can subscribe to one magazine and receive others free.

Philip Heiney, manager of the Phoenix branch of Family Publications Service, said that the company sells "package" magazine subscriptions by telephone.

Informed of the pending BBB action, Heiney said, "As far as I know, we're a member in good standing."

Heiney said he was unaware of any complaints.

"Frankly," White continued, "I don't have any unadjusted complaints in my file for Carpetime. They've adjusted all those brought to their attention."

White vaguely recalled that most complaints directed at Carpetime involved "poor installation" of carpeting but none about the quality of the carpeting itself.

The BBB manager said the installation of Carpetime's wares was "contracted out," thereby releasing the firm of any responsibility.

This was denied by Walter Selinger, owner of Carpetime, who said his firm assumes responsibility for all carpet installation jobs, whether contracted or done by his own employes.

Selinger maintained that complaints are "not always justified."

"Some people," he said, "complain about anything."

Even some crank complaints are given satisfaction, Selinger said, because, "Many times it's just for the sake of public relations."

Since Carpetime sells more carpeting than all of the rest of the dealers in Phoenix, Selinger said, its complaint frequency is bound to be relatively greater.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona, in and for the County of Maricopa and the Arizona Supreme Court

BRIEF FOR RESPONDENTS IN OPPOSITION

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March 21, 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1099

PHOENIX NEWSPAPERS, INC., an Arizona corporation
EUGENE C. PULLIAM and ALBERT J. SITTER,
Petitioners,

v.

JULIAN PEAGLER and DODGE CITY MOTORS, INC., an Arizona corporation,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of the State of Arizona, in and for the County of Maricopa and the Arizona Supreme Court

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion below is adequately set forth in the Petition [Petitioners' Appendix A, except that Petitioners failed to note the denial of two prior special actions which are set forth as Appendix A and B herein.]

JURISDICTION

It is the position of Respondents that this State Court libel lawsuit is not in such a posture that this Court should exercise its discretionary jurisdiction and bring this case up for a decision on the merits. The question with respect to jurisdiction is whether a Petition for Certiorari should be permitted in this State Court

action where no final judgment by the State Court exists and where no decision on the entire record has been made by the highest Court of the State of Arizona.

After discovery by Respondents, the Petitioners herein filed a Motion for Summary Judgment primarily alleging in an extensive Memorandum that the Fourteenth Amendment and the First Amendment's freedom of speech provision provided a qualified privilege to libel which justified dismissal of the lawsuit at the summary judgment stage. A response was filed by respondents at the trial level which assumed that the qualified privilege was applicable and then alleged that discovery had shown that the Petitioners had published an untruth which not only was printed in reckless disregard of the truth, but also was printed with knowledge that it was false. Despite the language of the Petition, the trial court did have the Constitutional issues before it and denied the Motion for Summary Judgment based upon the Constitutional qualified protections which have been announced in *Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny.

From that denial, Petitioners initially filed two Petitions for Special Action in the Arizona Supreme Court (the Special Action is Arizona's procedure for utilizing the extraordinary writs). The first Petition (Supreme Court Number 10727) alleged that the trial court abused its discretion and acted arbitrarily in denying the Petitioner, publisher's, Motion for Summary Judgment. The second Petition for Special Action (Supreme Court Number 10728) alleged that the trial court acted arbitrarily and capriciously for the reason that as a matter of law the Amended Complaint failed to state a claim against the Petitioners and therefore the Arizona Supreme Court should direct the entry of summary judgment in favor of Petitioners. These two Petitions were heard on January 4, 1972, before all members of the Arizona Supreme Court. The Court then issued an order declining to accept jurisdiction on both Special Actions (Respondents' Appendix A and B).

Thereafter, Petitioners again filed another Petition for Special Action and again requested that the Arizona Supreme Court direct the entry of summary judgment in favor of Petitioners on the grounds the trial court exceeded its jurisdiction by infringing upon the Petitioners' freedom of speech, press and privacy guaranteed by the First, Fourth and Fourteenth Amendments. This third Special Action relied upon an order that the publisher, EUGENE C. PULLIAM, answer interrogatories concerned with financial worth. The Petitioners alleged that the order requiring production of this information amounted to an abuse of discretion because the trial court should have granted Petitioners' Motion for Summary Judgment.

During the oral argument on this third Special Action, the Arizona Supreme Court was concerned about the manner in which the financial information was to be disclosed. Thereafter, the Arizona Supreme Court again declined to accept the Petition for Extraordinary Relief with one Justice voting to accept (Respondents' Appendix C).

This is the third refusal by the Arizona Supreme Court to entertain a Petition for Extraordinary Relief based upon the trial court's denial of the Petitioners' Motion for Summary Judgment.

Arizona Appellate Courts have specifically held that the denial of a Motion for Summary Judgment is not an order which can be appealed, *Burke v. Gottfried*, 7 Ariz.App. 96, 436 P.2d 488 (1968). Similarly, the Arizona Statute on Appeals, A.R.S. §12-2101, also fails to authorize an appeal from a denial of a Motion for Summary Judgment. A denial of the summary judgment is an interlocutory judgment, *Tucson Telco Federal Credit Union v. Bowser*, 6 Ariz.APP. 10, 429 P.2d 502 (1967); which does not justify review of that decision in the form of an appeal by the Arizona Appellate Court.

As stated by this court, a denial of a Motion for Summary Judgment "is strictly a pretrial order that decides only one thing

— that the case should go to trial." *Switzerland Cheese Assn. v. Horne's Market*, 385 U.S. 25 (1966). It is not a final decision which terminates the litigation in the Arizona Courts. In fact, the trial of the case was scheduled to begin on February 15, 1972, but was delayed by the trial court so Petitioners could have the opportunity to file this Petition.

It has been well established by 28 U.S.C. 1257(C) that a State Court decision must fulfill two essential requirements before this Court entertains jurisdiction. First, the State Court decision must be a final judgment and secondly it must be made by the highest State Court. Neither of these two essential requirements exist in this Petition.

The Judicial Code provides that there be a "final" judgment in the sense that the case is not subject to review or further correction by the State Court. As stated by this Court, "it must be the final word of a final Court." *Market Street Railway Company v. Railroad Commission*, 324 U.S. 548, 551 (1945). It is apparent that the denial of the Motion for Summary Judgment is not a final decision of the merits of this lawsuit. The case has yet to be before a jury or even before the Arizona Courts in the Appellate posture. The trial Judge can reverse his decision at any later stage of the trial process. For example, the trial court's decision could be reversed by entry of a directed verdict or granting a motion notwithstanding the verdict.

Not only is this Petition deficient because of finality, but is also deficient because the Arizona Supreme Court has not rendered a decision on the merits as indicated by its refusal, in three separate instances, to accept jurisdiction to review the merits of the trial court's decision on the Motion for Summary Judment.

The reason for the two jurisdictional requirements in the Judicial Code are quite sound and very applicable to this lawsuit. Issues received by interlocutory review in this Court may be mooted at a later time. Fore example, the Plaintiff may drop the claim or the Plaintiff may lose at trial via a directed verdict or as

a result of a jury decision. In addition, the Defendant may consent to judgment or the Defendant may compromise the claim thereby mooting the issue. Furthermore, the Petitioners here might prevail on the same issues before the State Court, should this claim be appealed after trial.

If a decision may be mooted at some point in the future, it is a waste of time for this Court to allow a review of an interlocutory order. Also, the ultimate disposition of the cause in the State Court would be unnecessarily delayed should this Court accept the Petition for Review. This Court will not have the benefit of reviewing the Constitutional question in the context of a full, factual record if it allows interlocutory review of this State Court decision. The judicial argument has always been that the finality rule is designed to avoid peacemeal review in the Supreme Court. It is inefficient and results in delayed and disrupted justice. This has been amply demonstrated in the *Catlin v. U.S.* case, 324 U.S. 229, 233-34 (1944):

> ". . . scarcely an order is imaginable which does not finally dispose of some particular point arising in the case; but that does not justify a review of such order, until the action itself has been finally disposed of. If every order were final, which finally passes upon some motion made by one or the other of the parties to a cause, it might in some cases require a dozen writs of error to dispose finally of the case." *Cincinatti Street Railway Company v. Snell*, 179 U.S. 395, 397 (1900).

These are some of the reasons why this Court has almost always refused to receive a Petition for Certiorari involving an interlocutory State Court decision.

Petitioners have cited a number of decisions where this Court has permitted interlocutory appeals. Initially, the Petitioners cite the Court to *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). This case is not particularly applicable since it concerns an appeal from a Federal Court case rather than a State Court decision. The other cases cited by Petitioners for interlocutory review involve decisions which give the State Court little oppor-

tunity for further review at a later stage of the proceedings; so in a sense the interlocutory decision is final and separable from the merits of the lawsuit. *Rosenblatt v. American Cyanamide Company*, 382 U.S. 110 (1965); *Mercantile National Bank v. Langdeau*, 371 U.S. 355 (1963); *Local No. 438 Construction and General Laborers' Union v. Curry*, 371 U.S. 542 (1963).

In the *Rosenblatt* case, *supra*, the constitutionality of New York's long arm statute was in issue. The Defendant was served in Italy and challenged the New York Court's jurisdiction by filing a Motion to Dismiss. This Court, through Justice Goldberg, observed that there had been no trial prior to the appeal; but also stated that the New York Court's decision on jurisdiction amounted to a "final" decision on that issue, "with no further review of that issue possible in the State Court". 15 L.Ed 39, 42. That situation does not exist in the present case. Furthermore, Justice Goldberg also noted that the decision on jurisdiction was separable from the merits and not enmeshed in the factual controversies of the case, and for this additional reason, he determined that the case was a "final" decision. The denial of a Motion for Summary Judgment in the present case is the one decision which, of necessity, must be concerned with the factual bases of the lawsuit and therefore the citation to Justice Goldberg is inapposite to the issue of this lawsuit. The same reasoning exists in the *Curry* case, *supra;* and the *Langdeau* case, *supra.* Each of these cases concerns interlocutory appeals where the decision was essentially a final decision that required no further review at a later stage of the trial proceeding, and was not enmeshed in the factual merits of the lawsuit. This situation does not exist in the present case for the trial court can reverse and review its decision on the Motion for Summary Judgment at many later stages in the trial of this lawsuit. As indicated previously, the Court can reverse itself by giving a directed verdict at the end of the Plaintiff's case or the Defendants' case or entering a judgment nothwithstanding the verdict following the trial of the matter. For this reason, the

cases cited by Petitioners for review of interlocutory state orders are not appropriate to the facts of this lawsuit.

STATEMENT

The events which gave rise to this libel action arose out of a front page article in the Arizona Republic on Sunday, August 30, 1970. The article was entitled "Better Business Bureau violates trust, ex-employees assert". Although the article did in some respects concern the Better Business Bureau, the main thrust of the article concerned the efforts of the Direct Sellers Association to secure a voter referendum on a Consumer Portection Bill which had been passed by the Arizona Legislature. The Legislation involved the regulation of direct selling of merchandise to the public in their homes. The Direct Sellers Association, a group of businessmen who engage in door-to-door selling, felt that certain portions of the Bill were not in the public interest and formed their association to seek enough voter petitions to have the legislation placed on the ballot by way of referendum and thereby prohibit the legislation from becoming law 90 days after the adjournment of the legislative session.

The Direct Sellers Association had been the subject of almost a daily barrage of articles, beginning on August 16, 1970, in which the newspaper alleged that the organization was misleading the public and acting fraudulently in their attempts to secure signatures in order to place the legislation before the public in the general election scheduled for November 3, 1970.

With this background, the newspaper published the article concerned with this lawsuit on August 30, 1970. The article purported to be concerned with the Better Business Bureau, but, in fact, was another of a series of articles concerned with the allegedly reprehensible conduct of the Direct Sellers Association. It seemed that the manager of the Better Business Bureau, Mr. White, was also a director of the Direct Sellers Association. That relationship provided the basis for connecting the Better Business

Bureau to the Direct Sellers Association. The article in question proceeded to discuss the Better Business Bureau and the Direct Sellers Association, but immediately went into a tangential discussion by quoting a disgruntled ex-employee of the Better Business Bureau who said the Respondent's business was the one business that had the most number of consumer complaints in the Better Business Bureau's files. The article thereafter reiterated the statement that Respondent, auto dealer, was the worst offender in the Better Business Bureau and then sandwiched further discussion about Respondent between comments that the Direct Sellers Association was engaging in misleading, reprehensible and fraudulent practices, thereby making Respondents the most reprehensible of the reprehensibles.

QUESTION PRESENTED

The ultimate question before this Court is whether the trial court was justified in deciding that substantial issues of fact exist under the applicable legal standards and therefore a jury may determine whether the newspaper libeled Respondents.

ARGUMENT

Prior to filing the lawsuit, investigation of the records of the Better Business Bureau showed conclusively that the auto agency did not have the greatest number of complaints on file in the Better Business Bureau and therefore the statement in the newspaper was untrue. On deposition, Mrs. Runser, the disgruntled ex-employee, was asked whether she had ever made the statement quoted in the newspaper. She denied having made the quoted statement to the reporter.

On deposition of the reporter, he stated that Mrs. Runser made the statements that were attributed to her. As stated in *Goldwater v. Ginzburg*, 414 F.2d 324, at 337:

> "One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter statements or observations are altered or taken out of context."

Since Mrs. Runser never made the statement, but yet the author

quotes her as having made the specific statement, a jury should be permitted to decide the reliability of testimony of the reporter and Mrs. Runser. If the jury believes Mrs. Runser, then the writer of the article must have fabricated the conclusion which appeared in the newspaper. It has been stated many times that calculated falsehood is not given Constitutional protection. *St. Amant v. Thompson,* 390 U.S. 727, (1968).

The reporter further indicated that written notes had been made of the conversation with Mrs. Runser, and he referred to the notes when the article was prepared. Deposition of the City Editor revealed that the newspaper had a policy of requiring their employees to save notes, especially when a retraction demand was submitted. In this case, the article was published on a Sunday, August 30, 1970, and Petitioners received a retraction demand on September 11, 1970, pursuant to the provision of A.R.S. 12-653.02. In reply to that demand, the City Editor forwarded a letter on September 14, 1970, indicating that he had specifically reviewed the notes of the reporter. When the reporter was asked to produce the spiral notebook and the notes of the conversation, he stated the notebook had been destroyed.

It must be remembered that the issue before the trial court was whether Respondents have facts to show the untruthfulness of the statement and other facts which tend to show malice as defined in *Times v. Sullivan, supra,* and *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971). Consequently, the decision which is challenged here and the question before the trial court was whether the Respondents made a showing of the kind contemplated by Rule 56 of the Arizona Rules of Civil Procedure that is sufficient to defeat the contention that there is no question of fact of whether the Petitioners entertained serious doubts of the truth or knowingly published an untruth. Rule 56 in Arizona practice as well as Rule 56 in the Federal Rules is designed to protect Petitioners from harrassment of a groundless trial by

requiring Plaintiffs to come forward in response to a Motion for Summary Judgment not with just an allegation of malice, nor with mere contention of what Respondents expect to prove in the way of malice, but with some evidence of the kind of conduct a jury could find under the applicable legal standards.

It is the position of Respondents that the Rule 56 burden has been met at the trial level by showing that Mrs. Runser has denied the statements attributed to her that Respondents had the greatest number of complaints in the Better Business Bureau; and therefore, the reporter had to know the quotes were untrue. In addition, there is an admission by the writer of the article that he did not know the number of complaints prior to the time he had published the article. This latter information was revealed in a transcript of a taped conversation with one of the owners of the newspaper. In a telephone interview prior to publication, the reporter recorded a conversation with the manager of the Better Business Bureau concerning the proposed article. Not once during that taped conversation did the reporter ask whether or not Respondent did have the most number of complaints. In *Mahnke v. Northwest Publications*, 160 N.W.2d 1 (1968), the Minnesota Court concluded that a quoted statement of a priest had no foundation in fact and if a follow-up had been made to verify the facts, it would have been clear that the statement of the priest was untrue. In the *Mahnke* case, as in this case, the trial judge determined that evidence did exist which might justify a jury in finding malice on the part of the Petitioners. The issue of malice is certainly raised by the denial of the quoted person that the statements concerning Respondents were ever made. In addition, the author's notes have been conveniently destroyed, even though the newspaper had a policy of keeping the notes of the publication. The context of the reply to the demand for retraction indicates the notes were in existence after publication and were reviewed following the demand for retraction. Yet, as indicated, the notes have been destroyed. Viewing the submitted materials

and the inferences which might be drawn from them, "in the light most favorable to the party opposing the motion", *U.S. v. Diebold, Inc.*, 369 U.S. 654. (1962), the trial court properly concluded that a trier of fact should have the opportunity to decide whether the Petitioner should be liable in damages to Respondents.

In conclusion, Mr. Peagler and Dodge City Motors, Inc., were caught up in the newspaper's campaign to show the Direct Sellers Association as a fraudulent, misleading and reprehensible organization. The Respondents were the sacrificial lambs that were slaughtered in the newspapers continuous efforts to perpetuate its position that the Direct Sellers Association was the most reprehensible organization to the consuming public. The evidence presented to the trial court and outlined here shows that the Respondents produced evidence under the applicable constitutional guarantees to create a jury question under Rule 56. For this reason, the trial court's denial of the Motion for Summary Judgment was justified by the evidence and it is therefore respectfully submitted that this Court refuse to entertain jurisdiction on this Petition.

CONCLUSION

Based upon the absence of proper jurisdiction and the fact that the decision below is clearly correct, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents
3003 North Central, Suite 1800
Phoenix, Arizona 85012

March 22, 1972

Appendix A

Supreme Court

State of Arizona

Phoenix

85007

January 5, 1972

EUGENE C. PULLIAM, Individually, Petitioner, vs. DODGE CITY MOTORS, INC., an Arizona corporation; JULIAN PEAGLER, an individual; GERALD J. STRICK, Judge of the Superior Court of Maricopa County, Arizona, and THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA, Respondents.	Supreme Court No. 10727 Maricopa County No. C-240270

The following action was taken by the Supreme Court of the State of Arizona on January 4, 1972 in regard to the above-entitled cause:

"ORDERED: The Court declines to accept jurisdiction at this stage of the proceedings without prejudice to the basic issues."

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO: Mark Wilmer, Esq., SNELL & WILMER, 400 Security Bldg., Phoenix, Arizona 85004

James F. Henderson, Esq., GUST, ROSENFELD & DIVELBESS, 300 Security Bldg. Phoenix, Arizona 85004

Harry J. Cavanagh, Esq., O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH & BESHEARS, 3003 N. Central - Suite 1800, Phoenix, Arizona 85012

Hon. Gerald J. Strick, Judge of Maricopa County Superior Court, 101 West Jefferson, Phoenix, Arizona 85003

Appendix B

Supreme Court

State of Arizona

Phoenix

85007

January 5, 1972

PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM and ALBERT J. SITTER, Petitioners, vs. JULIAN PEAGLER, an individual; GERALD J. STRICK, Judge of the Superior Court of Maricopa County, Arizona, and THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA, Respondents.	Supreme Court No. 10728 Pima (Sic) County No. C-240270

The following action was taken by the Supreme Court of the State of Arizona on January 4, 1972 in regard to the above-entitled cause:

"ORDERED: The Court declines to accept jurisdiction of the Petition for Special Action."

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO: Harry J. Cavanagh, Esq., O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH &

BESHEARS, 3003 N. Central - Suite 1800, Phoenix, Arizona 85012

Mark Wilmer, Esq., SNELL & WILMER, 400 Security Bldg. Phoenix, Arizona 85004

James F. Henderson, GUST, ROSENFELD & DIVELBESS, 300 Security Bldg., Phoenix, Arizona 85004

Hon. Gerald J. Strick, Judge of Maricopa County Superior Court, 101 West Jefferson, Phoenix, Arizona 85003

Appendix C

Supreme Court

State of Arizona

Phoenix

85007

February 2, 1972

PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM and ALBERT J. SITTER,

Petitioners,

vs.

JULIAN PEAGLER, and DODGE CITY MOTORS, INC., an Arizona corporation; THE HONORABLE GERALD J. STRICK, Judge of the Superior Court of Maricopa County, Arizona, and THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA,

Respondents.

Supreme Court No. 10752

Maricopa County No. C-240270

The Following action was taken by the Supreme Court of the State of Arizona on February 1, 1972 in regard to the above-entitled cause:

"ORDERED: The Court declines to accept jurisdiction of the Petition for Special Action, with Justice Fred C. Struckmeyer, Jr. voting to accept."

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO: O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH & BESHEARS, Suite 1800 First Federal Savings Building, Phoenix, Arizona 85012

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Hon. Gerald J. Strick, Judge of Superior Court, 101 W. W. Jefferson, Phoenix, Arizona 85003

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In the Supreme Court of the United States

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MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1971

No. 71-1099

PHOENIX NEWSPAPERS, INC., an Arizona corporation; EUGENE C. PULLIAM and ALBERT J. SITTER,

Petitioners,

v.

JULIAN PEAGLER and DODGE CITY MOTORS, INC., an Arizona corporation,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of the State of Arizona, in and for the County of Maricopa and the Arizona Supreme Court

Petitioners' Reply to Respondents' Brief in Opposition

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I

Point 1—The Final Judgment Question

The entire thrust of respondents' position in regard to jurisdiction is that the orders from the Arizona Superior Court and Arizona Supreme Court are not "final" orders and the Court should therefore decline jurisdiction pursuant to 28 U.S.C. § 1257(3).

The argument by respondents in this regard totally ignores both the "chilling effect" considerations embodied in

Dombrowski v. Pfister, 380 U.S. 479 (1965); *Mills v. Alabama,* 384 U.S. 214 (1966); and *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971) as well as the compelling rationale from *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949). The Arizona courts' refusal to act upon petitioners' claims of invasion of first amendment rights constitutes a final denial of this independent constitutional right, "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

Indeed, as pointed out by respondents, the Arizona Supreme Court has not once, but thrice refused to halt this unwarranted invasion of first amendment rights. In light of the Arizona courts' refusal to apply the rules enunciated by the Court as to the mandates of the Federal Constitution, [*see e.g., Cooper v. Aaron,* 358 U.S. 1, 18 (1958)] the futility, frustration, and "chilling effect" of prolonging this state court litigation ought not to be permitted.

II

Point 2—First Amendment Protection Question

The sole argument raised in support of the position that there was sufficient showing of "actual malice" to withstand the granting of petitioners' motion for summary judgment is that the witness Runser denied in her deposition making the statements attributed to her in the newspaper article.

Even if the Runser deposition testimony amounted to such a denial, this would not constitute "clear and convincing proof" that the material was published with knowledge it was false or with reckless disregard of truth or falsity. *Rosenbloom v. Metromedia, supra; Wasserman v. Time, Inc.,* 424 F.2d 920 (D.C. Cir. 1970).

However, a reading of the Runser deposition discloses that the statements in the article attributed to her were substantially accurate:

> Q. As a matter of fact, did the file at Better Business Bureau have a large number of complaints against Peaglers Dodge City?
>
> A. Yes, sir.
>
> Q. Against Carpetime?
>
> A. Yes, sir.
>
> Q. Against Family Services?
>
> A. Yes, sir.
>
> Q. What did you tell him [Sitter] with respect to the complaints that were filed involving Peaglers Dodge City or Carpetime or the other one?
>
> A. I told him during my employment of handling the complaints that I indeed had received a large volume in comparison to the other car dealers and such, I received the most from Peaglers.
>
> Q. The distinction was with reference to car dealers that you were speaking of and not with respect to business in general, is that correct?
>
> A. What I told Mr. Sitter?
>
> Q. Yes.
>
> A. That during my employment Peagler received the most of any company in any area than any other company or any other business.[1]
>
> Q. Are you speaking about business or automobile business?
>
> A. Any type of business.[2]

(Runser deposition transcript, p. 39, l. 3 to p. 40, l. 3.)

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1. This answer is set forth as it originally appears in the deposition. The deposition after being transcribed was submitted to Mrs. Runser for her to read and correct in accordance with Rule 30(e), ARIZ. R. CIV. P. (identical to Rule 30(e), FED. R. CIV. P.) Mrs. Runser "corrected" this answer so that it now reads: "That during my employment Peagler received the most of any company in the area of automobile dealerships."

2. This answer now reads: "Automobile business." See note 1, *supra*.

Q. In response to a question by Mr. Wilmer, I think you made a statement to the effect that Peaglers Dodge City had received the most complaints in the Better Business Bureau. Did you mean to say that?

A. Shall I say what I meant to say?

Q. Did you mean to say that?

A. No.

Q. What did you mean to say?

A. In the length of time that I worked there they had received, to my recollection, the heaviest flow of complaints.[3] (p. 58, l. 3 to 14.)

Respondents' reliance on *Goldwater v. Ginzburg*, 414 F.2d 324 (CA2 1969) appears not only to be misplaced, but *Ginzburg* clearly points up the contrast between a situation where there was a sufficient showing of actual malice and the situation in the instant case.

In *Ginzburg*, the trial court, upon denying Ginzburg's motion for summary judgment, specifically listed the evidentiary material from which the jury could find actual malice:

1. The covering letter with which the questionnaire was mailed to the psychiatrists.

2. Ginzburg had information about the 'nervous breakdowns' mentioned in the covering letter from one source only, and did not know whether or not that source had the information from personal knowledge.

3. In showing how the psychiatrists' letters were signed, 'name withheld' was used interchangeably with 'anonymous,' that is, replies which were unsigned were shown as 'name withheld' which might be found to suggest that they had been signed.

4. A letter from the Medical Director of the American Psychiatric Association warned of the invalidity of the Fact survey because responses were sought

3. This answer now reads: "In the length of time that I worked there they had received, to my recollection, the heaviest flow of complaints in the automobile industry." See note 1, *supra*.

despite the fact that none of those asked to respond had made a 'thorough clinical examination,' Ginzburg read this letter before he published the magazine. The letter was not published with the questionnaire.

5. Ginzburg did not read in their entirety articles from which he took quotes to supply the basis for his own piece. Instead, he read only the parts underscored for him by others. Thus, at times he would quote one part of an article without quoting another part which might tend to qualify or contradict the part quoted. He omitted contradictory material within the same sentence when quoting from that sentence.

6. There are some statements in Ginzburg's article for which he could not establish a basis on his deposition.

7. There is much to indicate alteration of responses from the psychiatrists. For example:

a. a *signed* letter which was critical of the Fact survey was published as 'anonymous';

b. one published 'letter' was in fact a distillation of the original, done by Ginzburg, without so indicating in the magazine;

c. there were occasions when two responses were published as one reply;

d. in one letter the words were changed and rewritten by Ginzburg;

e. on two occasions qualifying paragraphs in a response were omitted when published; and

f. Ginzburg testified as to one response that he 'didn't even consider' whether it was true or false, and that all he cared about was printing what the man said. Goldwater v. Ginzburg, *supra* 261 F.Supp. at 787. 414 F.2d at 336-337. (Emphasis Original)

Discussing this evidence the Second Circuit said:

As can be seen, appellee and the district judge did not rely on a few isolated instances of derogatory statements which could be charitably thought of as being nonactionable negligent or good faith misstatements of fact, but rather upon the totality of appel-

lants' conduct, as evidenced by the proffered materials, from which a jury might reasonably find a *predetermined and preconceived plan to malign the Senator's character*. The fact that appellants' supporting affidavit denied that the 'Goldwater issue' had been published with actual malice does not require that their motion for summary judgment be granted, *especially in light of appellee's countering materials*. St. Amant v. Thompson, 390 U.S. 727, 732, 88 S. Ct. 1323, 20 L.Ed.2d 262 (1968).

414 F.2d at 337. (Emphasis supplied.)

Petitioners have no quarrel with the result in *Ginzburg;* it was proper under its facts. However, the failure of the Arizona courts to require respondents in this case to come forth with a similar showing in opposition to petitioners' motion for summary judgment demonstrates the refusal of the Arizona courts to protect petitioners' first amendment rights in accordance with the mandates of the Court.

CONCLUSION

For the foregoing reasons and for the reasons set forth in petitioners' Petition, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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